Mui Bank Bhd Johor v Tee Puat Kuay

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 37 OF 1992
ALAUDDIN J
22 JULY 1993

Labour Law *— Industrial court — Jurisdiction — Award — Reinstatement — Whether relief of reinstatement appropriate — Whether within jurisdiction of industrial court to grant order when employer had 'lost confidence' in employee — Industrial Relations Act 1967 s 30(1)*

Labour Law *— Industrial court — Jurisdiction — Charge of misappropriation — Whether industrial court erred in law and jurisdiction by setting too high a standard of proof*

Labour Law *— Industrial court — Jurisdiction — 'Condonation' of employee's actions — Whether industrial court erred in law and jurisdiction by finding condonation on the facts of the matter*

Labour Law *— Industrial court — Jurisdiction — Presumption in s 114(g) of the Evidence Act 1950 — Adverse inference — Whether industrial court erred in law and jurisdiction by invoking presumption in absence of clear evidence to permit it — Evidence Act 1950 s 114(g)*

Evidence *— Presumption — Adverse inference — Failure to produce evidence — Whether court could draw adverse inference — Evidence Act 1950 s 114(g)*

Evidence *— Burden of proof — Charge of misappropriation — Applicant relying on circumstantial evidence — Whether evidence must point irresistibly to guilt of respondent — Whether industrial court erred in law and jurisdiction by setting too high a standard of proof*

Evidence *— Inadmissible evidence — Failure to object — Whether court could exclude inadmissible evidence even if admissibility not objected to by counsel — Inadmissible evidence does not become admissible by reason of failure to object*

The respondent was an officer at the applicant bank ('the bank') when, following the findings of a domestic inquiry, the respondent was dismissed from service for misappropriating the bank's money. The dismissal was referred to the industrial court which reinstated the respondent. The bank sought an order of certiorari to quash the award of the industrial court, contending that the court had erred in law and jurisdiction when: (i) it concluded that the domestic inquiry was required to find that the evidence should conclusively point to the guilt of the respondent; (ii) it had asked the wrong question, ie whether the domestic inquiry had conclusively found the respondent guilty; (iii) it concluded that the applicant bank had condoned the actions of the respondent; (iv) it wrongly invoked the presumption in s 114(g) of the Evidence Act 1950 when there was no clear evidence before it to do so; (v) it required that the 'authenticity' of transcribed

reports, proceedings and tapes be proved when it was unchallenged in the course of the hearing; (vi) it reinstated the respondent when it was not appropriate to do so; and (vii) it failed to ask the appropriate questions to decide if the charge of misappropriation could be substantiated.

Held, dismissing the application:

(1) Where the evidence relied on was circumstantial, it must point irresistibly to the guilt of the respondent. Mere suspicion, as in this case, was not a sufficient ground for dismissal. The industrial court, based on the facts before it, had asked itself the right question and decided correctly in law and had not acted without jurisdiction.

(2) Misconduct is 'condoned' where an election is made to retain an employee guilty of misconduct. Condonation is essentially a question of fact depending on the circumstances of the case and the industrial court was correct in finding condonation on the facts of the matter.

(3) It was perfectly in order for the industrial court to have drawn an adverse inference against the applicant bank by invoking the provisions of s 114(g) of the Evidence Act 1950, as there was no reason why adverse inferences should not be drawn in appropriate circumstances against a party who fails to raise vital evidence, especially where the evidence could have been produced but was not. In any event, the improper rejection of evidence or the making of a decision which is not supported by evidence does not establish jurisdictional error.

(4) An erroneous omission to object to an inadmissible evidence does not make it admissible. It is the duty of the court to exclude inadmissible evidence even though there was no objection by the parties during the hearing.

(5) The power to make an award by the industrial court is provided by s 30(1) of the Industrial Relations Act 1967. The order of reinstatement was a fit and proper order and the mere assertion of the bank that it had lost confidence in the respondent cannot compel the industrial court to refrain from passing an order of reinstatement.

Per curiam:

In a judicial review, the court does not sit as an appellate court to review the findings of the inferior tribunal. Its only function is to consider whether the tribunal had performed its duties according to law.

[Bahasa Malaysia summary

Responden berkhidmat sebagai seorang pegawai di pemohon bank ('bank itu'). Berikutan dengan suatu siasatan domestik oleh bank itu, responden telah dipecat dari jawatannya kerana melesap wang bank

itu. Pecatan itu telah dirujukkan kepada mahkamah perindustrian yang telah mengembalikan semula responden ke jawatannya. Bank itu telah memohon suatu perintah certiorari untuk membatalkan award mahkamah perindustrian itu dan mendakwa bahawa mahkamah itu telah membuat keputusan yang salah dari segi undang-undang dan bidang kuasa apabila ia: (i) memutuskan bahawa siasatan domestik perlu berpendapat bahawa mesti terdapat keterangan yang menunjukkan dengan muktamad kesalahan responden; (ii) menanya soalan yang salah, iaitu sama ada siasatan domestik telah mendapati dengan muktamad kesalahan responden; (iii) membuat kesimpulan bahawa bank itu telah membiarkan (condoned) tindakan responden; (iv) dengan salah menggunakan anggapan di bawah s 114(g) Akta Keterangan 1950 sedangkan tidak ada keterangan yang nyata untuk berbuat demikian; (v) berkehendakkan supaya keesahan laporan, prosiding dan pita yang telah ditranskriptsikan dibuktikan walaupun tidak ada bantahan semasa perbicaraan; (vi) mengembalikan semula responden ke jawatan asalnya sedangkan ia tidak sesuai berbuat demikian; dan (vii) gagal untuk menanya soalan yang sesuai untuk menentukan sama ada pertuduhan pelesapan itu dapat disokong.

Diputuskan, menolak permohonan itu:

(1) Apabila bergantung kepada keterangan ikut keadaan, keterangan itu mesti menunjukkan kesalahan responden secara tidak dapat dibendung. Perasaan syak semata-mata tidak mencukupi untuk menjadi asas pemecatan. Berdasarkan fakta-fakta yang terdapat, mahkamah perindustrian telah menanya diri soalan yang betul dan telah memutuskan dengan betul mengikut undang-undang dan tidak bertindak di luar bidang kuasanya.

(2) Pembiaran (condonation) dilakukan apabila suatu pilihan dibuat untuk mengekalkan seseorang pekerja yang salah laku. Pembiaran itu adalah pada asasnya, suatu soalan fakta yang bergantung kepada keadaan kes, dan mahkamah perindustrian telah membuat keputusan yang betul apabila mendapati bahawa terdapat pembiaran memandangkan fakta-fakta perkara ini.

(3) Memang tepat sama sekali untuk mahkamah perindustrian menimbulkan inferens menentang terhadap bank itu dengan menggunakan peruntukan di bawah s 114(g) Akta Keterangan 1950 kerana tidak ada sebab mengapa inferens menentang tidak dapat ditimbulkan di dalam keadaan yang sesuai terhadap suatu pihak yang gagal untuk membangkitkan keterangan yang penting, terutama sekali apabila keterangan itu dapat ditimbulkan tetapi tidak. Walau bagaimanapun, penolakan keterangan secara tidak betul atau pembuatan sesuatu keputusan yang tidak disokong oleh keterangan bukan merupakan kesilapan bidang kuasa.

(4) Kegagalan untuk membuat bantahan terhadap kebolehterimaan keterangan tidak menjadikan keterangan itu boleh diterima. Adalah menjadi tugas mahkamah untuk mengecualikan keterangan yang tidak boleh diterima walaupun tidak ada bantahan oleh mana-mana pihak semasa perbicaraan.

(5) Kuasa mahkamah perindustrian untuk membuat suatu award diperuntukkan di bawah s 30(1) Akta Perhubungan Perusahaan 1967. Perintah mengembalikan semula responden ke jawatan asalnya adalah suatu perintah yang betul dan sah, dan tegasan semata-mata bank itu bahawa mereka telah hilang keyakinan terhadap responden tidak akan menghalang mahkamah perindustrian daripada membuat perintah untuk pengembalian semula responden ke jawatannya.

Per curiam:
Di dalam suatu kajian semula kehakiman, mahkamah tidak bersidang sebagai suatu mahkamah rayuan untuk mengkaji semula keputusan tribunal bawahan. Tugasnya hanyalah untuk mempertimbangkan sama ada tribunal itu telah menjalankan tugasnya mengikut undang-undang.]

[*Editorial Note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02–485–93.]

Notes
For cases on the jurisdiction of the industrial court, see 8 *Mallal's Digest* (4th Ed) paras 696, 698–704, 710, 712 and 714–730.
For cases on adverse inference drawn by the courts, see 7 *Mallal's Digest* (4th Ed) paras 1027–1053.
For cases on the exclusion of inadmissible evidence, see 7 *Mallal's Digest* (4th Ed) paras 894–896.

Cases referred to
1 *Mak Sik Kwong (No 2)* [1968] 2 MLJ 175 (folld)
2 *Chan Siew Kim* [1978] 1 MLJ 144 (folld)
3 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors* [1980] 2 MLJ 165 (folld)
4 *Anisminic Ltd v Foreign Compensation Commission & Anor* [1969] 2 AC 147; [1969] 1 All ER 208 (folld)
5 *Armah v Government of Ghana & Anor* [1968] AC 192; [1966] 3 All ER 177 (folld)
6 *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (folld)
7 *R v The Justices of the Central Criminal Court* (1886) 17 QBD 598 (folld)
8 *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 (folld)
9 *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 (folld)

Legislation referred to
Industrial Relations Act 1967 ss 30(1)

Nagarajah Muttiah (Shook Lin & Bok) for the applicant.
Gana Muthusamy (Gana Muthusamy & Co) for the respondent.

Cur Adv Vult

Alauddin J: Mui Bank Bhd Johor, the applicant, filed an application by way of notice of originating motion (encl 10) for:

> An order for certiorari to remove into this court, for the purpose of it being quashed, the award of the industrial court made on 9 October 1992, ie Industrial court Award No 270 of 1992.

The grounds as set forth in the copy of the statement filed on 31 October 1992 are:

(1) the industrial court committed an error of law and of jurisdiction in that it concluded that, on a charge of misappropriation, the domestic inquiry was required to find that the evidence would '... conclusively point to the claimant' as being guilty;
(2) the industrial court committed an error of law and of jurisdiction by asking itself the wrong question, ie whether the domestic inquiry had conclusively found the respondent to be guilty;
(3) the industrial court committed an error of law and of jurisdiction in concluding that the applicant 'condoned' the actions of the respondent within the meaning of that term and law;
(4) the industrial court committed an error of law and of jurisdiction by invoking s 114(g) of the Evidence Act 1950 when there was no clear evidence before the court that permitted the said provision to be invoked;
(5) the industrial court committed an error of law and of jurisdiction by requiring that the 'authenticity of transcribed reports and proceedings and the tapes' had to be proved when there was no challenge to the same in the course of the hearing;
(6) the industrial court committed an error of law and of jurisdiction by awarding the relief of reinstatement which in law was not appropriate in the circumstances of the case; and
(7) the industrial court committed an error of law and of jurisdiction by failing to ask itself the appropriate questions to decide if the charge of misappropriation could be substantiated.

Before proceeding to consider the grounds put forth, some brief background information is necessary. The respondent, Tee Puat Kuay joined the Mui Bank, Segamat branch on 16 November 1982 as a class 1 officer. On 9 July 1987, he was appointed as cash officer cum operational officer. On at least two occasions during the course of his service with the bank, the respondent received letters of merit in recognition of his performance and service with the bank. All along, he had no problems with the bank.

On 21 August 1989, the day of the alleged incident, everything appeared normal when the bank opened for business. As usual, the cash till was taken out from the vault by the respondent and kept by him throughout the day. The respondent, during the course of the day, dispensed cash whenever a teller requisitioned for it. He took the cash from the till kept under his table. When the bank closed for business that day, it was found that there was a shortfall of RM40,000 from the till, and in the books, some alterations had been made on entries for 19 August 1989. They were unauthorized alterations as they did not bear the initials of the respondent or the assistant manager.

The respondent, the assistant manager, the manager and all the staff searched the bank from top to bottom, but the money was not found.

In the aftermath, the respondent was relieved of his duties as cash officer and relegated to an unspecified post. As he was not suspended from work, he resumed duties as usual.

However, a week later, ie on 28 August 1989 at about 8am, the respondent, whilst at his house, received a mysterious phone call informing him that the riddle of the missing money could be resolved if he could locate a certain red dustbin near a certain restaurant in Segamat town. The respondent immediately passed this information to the assistant manager and the respondent, together with his house-mate, proceeded to the place of rendezvous followed by the assistant manager soon after. True enough, out of the red dustbin they fished out a bundle wrapped up in newspaper and brought it to the bank. On opening the bundle, they found a stack of RM100 bills which amounted to RM29,500.

The respondent however, could not come up with an explanation at that time as he was confused and under pressure. Under those circumstances, he agreed to make good the missing money.

In September 1989, the respondent was transferred to the Mui Bank headquarters in Kuala Lumpur, where he was assigned to the general services department until his services were terminated on 19 January 1990, following the verdict of a domestic inquiry set up by the bank, which found that the respondent had 'misappropriated a sum of RM40,000 being the bank's money which was held in the respondent's custody'.

The respondent claimed that the dismissal was without just cause or excuse, unfair and unjust. Arising out of the dismissal, the honourable the Minister of Human Resources, Malaysia, made a reference to the industrial court under s 20(3) of the Industrial Relations Act 1967 ('the Act').

At the end of the reference, after having heard both parties, the industrial court made an award that the respondent be reinstated with the bank without loss of salaries, allowances and all other benefits to which he was entitled to from the date of dismissal. Hence the present application before me.

As clearly spelt out in s 33B(1) of the Act, an award, decision or order of the industrial court, shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court.

This particular section enacts a privative clause precluding certiorari in respect of any award, decision or order of the industrial court under the Act.

However, it was held in the case of *Mak Sik Kwong (No 2)*,[1] that a privative clause of this nature was not operative in the face of a jurisdictional defect or fraud and had no effect at all as regards jurisdictional review. The same was reaffirmed in *Chan Siew Kim*'s case.[2] Both these cases were cited with approval by the Privy Council in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturers Employees Union & Ors*,[3] where in considering the effect of the above provision, (then s 29(3)), the Privy Council decided that a distinction would have to be made

between an error of law which affects jurisdiction and an error of law which does not affect jurisdiction. The distinction is shown in the judgment at p 167 where Lord Fraser said:

> But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective.

In that same case, the Privy Council made a reference to the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission & Anor*,[4] where Lord Reid said that there were many cases where, although the tribunal had jurisdiction to enter on an inquiry, it had done or failed to do something in the course of the inquiry which was of such a nature that its decision was a nullity. For example, it may have given its decision in bad faith, or it may have made a decision which it had no power to make, or it may have failed in the course of the inquiry to comply with the requirements of natural justice. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. Lord Reid continued at p 171 as follows:

> I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

I shall now consider the grounds relied upon by the applicant in this application.

Proof of misappropriation (grounds 1, 2 and 7)

The industrial court, having heard witnesses for the applicant and the evidence of the respondent and considered all the facts and documents relevant to the reference, came to a conclusion that there was no direct evidence that the respondent had misappropriated the bank's RM40,000. It said that suspicions and conjectures abound but the circumstantial evidence did not conclusively point to the respondent.

Where the applicant is relying on circumstantial evidence, the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the respondent. Mere suspicion, as in this case, therefore could not be accepted as sufficient ground for dismissal.

The industrial court found it difficult to accept that the inquiry held by the applicant in this case, had acted fairly and justly and its decision could not be supported by the court.

On the facts of the case, the court was of the view that the dismissal did not reflect fair industrial practice and was not in accordance with good conscience and equity as provided in s 30(5) of the Act. The court found that the dismissal of the respondent was without just cause or excuse.

From the findings of the industrial court, I cannot see how it can be said that the court had committed an error of law and jurisdiction. It was perfectly within the jurisdiction of the court to decide, based on the evidence before it, whether the charge of misappropriation had been made out.

It was alleged by the applicant that the industrial court was setting too high a standard with respect to burden of proof. According to the applicant, a 'reasonableness test' was sufficient. With respect, I do not agree. I am of the opinion that the industrial court, based on the facts before it, had asked itself the right question and decided correctly in law and there was nothing to suggest that it had acted without jurisdiction. It was essentially a question of fact before the court.

Even assuming that the decision of the court was wrong in law, does it affect jurisdiction? In the case of *Armah v Government of Ghana & Anor*,[5] Lord Reid had this to say [at p 234]:

> If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction ...

The applicant here merely had a genuine belief in the guilt of the respondent but they had no reasonable grounds for that belief and they had not carried out as much investigation into the matter as was reasonable in all the circumstances. The court's decision should therefore be upheld.

Condonation of respondent's actions (ground 3)

The applicant having found that the respondent was guilty of 'misappropriation', allowed the respondent to continue working in the Segamat Branch and subsequently transferred him to their headquarters in Kuala Lumpur where he worked for about five months before he was dismissed. For this reason, the industrial court found that the applicant had 'condoned' the respondent's actions.

The question that arises here is whether the industrial court was correct in law in finding 'condonation' on the facts of the matter. To my mind, misconduct is deemed 'condoned' where an election is made to retain an employee guilty of misconduct. As such, I cannot see how the industrial court had committed an error of law in coming to that decision. There is no such thing as a law of condonation. It is essentially a question of fact depending on the circumstances of the matter.

Section 114(g) of the Evidence Act 1950 (ground 4)

The industrial court found that the padlock used by the respondent to lock the till was a vital clue in the case and this padlock was not produced before the court. Upon discovering that RM40,000 was missing, the applicant relieved the respondent of his duties immediately. That same night, the respondent handed over to the bank the till, the keys and the padlock. But CW1, the assistant manager, denied that the padlock was returned by the respondent. However, in his evidence he said that when he took over as cash officer from the respondent, he used the same padlock.

Based on these facts, the industrial court invoked the provisions of s 114(g) against the applicant. I find that it was perfectly in order for the court to have done so. There is no reason why adverse inferences should not be

A drawn in the appropriate circumstances against a party who fails to raise such evidence, especially where the evidence could have been produced, as in this case.

It was contended by the applicant that there was no clear evidence before the court that permitted the said provision to be invoked. With regard to this, it was held in *R v Nat Bell Liquors Ltd*,[6] that improper rejection of B evidence or even the making of a decision which was not supported by evidence does not establish jurisdictional error.

Proof of the 'authenticity of transcribed reports and proceedings and the tapes' (ground 5)

C Under this ground, it was contended on behalf of the applicant, that since there was no objection raised by the respondent in the course of the hearing, it was wrong for the industrial court to rule that the authenticity of the above mentioned items was not proved to the court. By so deciding, the court is alleged to have committed an error of law and jurisdiction.

D Under these circumstances, I think it is really a matter for the court to decide, even though there was no objection raised. An erroneous omission to object to inadmissible evidence does not make it admissible. It is the duty of the court to exclude such inadmissible evidence even though no objection is taken to its admissibility by the parties.

I therefore find that although there was no objection raised by the E respondent in the course of the proceedings, it was perfectly proper for the court to have ruled as it did. Its decision cannot be said to amount to an error of law or jurisdiction. Even if it was an error in law, it certainly did not affect jurisdiction.

It was held in *R v The Justices of the Central Criminal Court*,[7] that where F an authority has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact.

Relief of reinstatement (ground 6)

G It was the applicant's argument that in the circumstances of the case, it was not appropriate in law for the industrial court to award relief of reinstatement.

The power to make an award by the industrial court is provided by s 30(1) of the Act which reads:

> The Court shall have power in relation to a trade dispute referred to it *or in* H *relation to a reference to it under section 20(3)*, to make an award (including an interim award) relating to all or any of the issues. (Emphasis added.)

It would clearly appear, therefore, that if a workman does not require reinstatement, there would not be reference to the industrial court under s 20(3) of the Act. Although, as contended by the applicant, I compensation could be ordered, it is not wrong for the court to order reinstatement. Each case has to be considered on its own merits and in reaching a final decision an attempt must be made to reconcile the conflicting claims made by the workman and the employer. The workman is entitled to security of service and should be protected against wrongful dismissal

and so the normal rule would be reinstatement in such cases. A decision will have to be made in a spirit of fairness and justice.

In this case, the respondent had been working in the banking industry for about 20 years and since the applicant is a big organization with nationwide network, it would not be difficult to place the respondent in any one of its branches without loss of confidence. The mere assertion of the employer that he has lost confidence cannot compel the industrial court to refrain from passing an order of reinstatement.

Under the circumstances of this case, I hold that the order of reinstatement by the industrial court was a fit and proper order and it cannot be said that the court had committed a jurisdictional error.

From my observation, all the seven grounds relied upon by the applicant in this application in essence impugn the decision of the industrial court on its merits. From the tone of his submission before me, there was no doubt that counsel for the applicant was really engaged in arguing the application on the merits of the trade dispute.

It must be borne in mind that the court here is not sitting as an appellate court to review the findings of the inferior tribunal and the Federal Court in *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Industrial court of Malaysia*[8] at p 371 said:

> The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit.

Words to the like effect were echoed in a more recent case of *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers*,[9] where the Supreme Court (at p 419) said:

> It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable. There is no dearth of authorities on this proposition ...

And at p 887 it continued:

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute 'de novo' and decide it on its merits. The industrial court had heard evidence from both sides and submissions by their counsel and it came to a decision exculpating Tang Seng Khow from the allegation in the fourth charge. Clearly this is a case where the tribunal had, by virtue of the powers entrusted upon it by the Industrial Relations Act 1967, to weigh and evaluate the evidence of witnesses for the company and the evidence of Tang Seng Khow. It is surely not a case where the industrial court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably come.

It is my considered view in the light of the authorities cited that assuming that there was any error of law in this matter, it was made within jurisdiction, but I find there is in fact no such error of law. In the result, I find that there

A was no excess or lack of jurisdiction when the Industrial court made its award.

In the event, certiorari is refused. The motion is dismissed. The respondent will have the taxed costs of these proceedings.

Application dismissed.

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Reported by JE Rajasooria

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